

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Kenneth M. Rose; David S. Walker; Michael A. Benning;
Mick R. Jacobs

Assignee: Cisco Technology, Inc.

Title: SYSTEM AND METHOD FOR SWITCHING LOW LATENCY HIGH PRIORITY TRAFFIC

Application No.: 10/602,307 Filing Date: June 24, 2003

Examiner: Andrew Chung Cheung Lee Group Art Unit: 2419

Docket No.: CIS0199US Confirmation No.: 9007

Austin, Texas
November 24, 2009

Mail Stop ISSUE FEE
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

**PETITION FOR REVIEW OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. § 1.705(b)**

Dear Sir:

Applicant petitions for a review and correction of the patent term adjustment (PTA) that has been calculated for the above-noted application. As explained below, Applicant submits that the calculated PTA of 906 days is incorrect, and that in accordance with *Wyeth v. Dudas*, 580 F. Supp. 2d 138 (D.D.C. 2008), the correct PTA for the present application is 1134 days.

A Notice of Allowance and Issue Fee(s) Due was mailed on August 24, 2009 (the “Notice of Allowance”) for the present application. The Notice of Allowance set a due date of November 24, 2009 for payment of the issue fee. This petition is timely submitted along with or prior to the issue fee, in accordance with 37 C.F.R. § 1.705(b).

The Notice of Allowance included a Determination of Patent Term Adjustment under 35 U.S.C. § 154(b). According to that determination, the PTA for the present application is 906 days. This calculation is explained on the Office’s PAIR web site, which includes an outline of the Office’s calculation. A copy of that calculation is attached.

In accordance with the 37 C.F.R. § 1.705(b)(2), Applicant states the following.

- (i) The correct patent term adjustment for the present application is **1134 days**. This correction follows from the correct assessment of days that “overlap” in the calculation of PTA under 35 U.S.C. § 154(b)(2)(A). *See Wyeth v. Dudas*, 580 F. Supp. 2d 138 (D.D.C. 2008).
- (ii a) The period of adjustment under 37 C.F.R. § 1.703(a) is **941 days** beginning on the day after August 24, 2004 (the date that is fourteen months after March 24, 2003, which is the date on which the application was filed under 35 U.S.C. § 111(a)) and ending on March 23, 2007 (the date of mailing of an action under 35 U.S.C. § 132).
- (ii b) The period of adjustment under 37 C.F.R. § 1.703(b) is **500 days**, beginning on the day after June 24, 2006 (the date that is three years after March 24, 2003, which is the date on which the application was filed under 35 U.S.C. 111(a)) and ending on November 6, 2007 (the date before Applicant’s first Request for Continued Examination under 35 U.S.C. 132(b) was received and filed in the Office records).
- (ii c) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(c), since there was no delay due to an interference.
- (ii d) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(d), since there was no delay due to a seal or to a secrecy order.
- (ii e) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(e), since there was no delay due to an appeal.
- (ii f) The periods of adjustment in (ii a) and (ii b) include an overlap, which is to be deducted from the sum of the adjustment periods under 37 C.F.R. § 1.703(f). From the above statements, it is clear that the calendar days that actually overlap is the calendar period of **272 days**, beginning on the day after June 24, 2006 and ending on March 23, 2007.

Section 1.703(f) provides that “[t]he term of a patent entitled to adjustment under § 1.702 and this section shall be adjusted for the sum of the periods calculated under paragraphs (a) through (e) of this section, to the extent that such periods are not overlapping.” This sum is 941 + 500 days, less the 272-day period of overlap, resulting in 1169 days.

(Section 1.703(f) further provides that this period should be further adjusted “less the sum of the periods calculated under § 1.704.” This reduction is discussed below.)

- (iii) The present application is not subject to a terminal disclaimer.
- (iv) The following periods of time, which total 35 days, are deemed under the Office’s procedures to constitute “Applicant Delay” from deemed failures to engage in reasonable efforts to conclude processing or examination under 37 C.F.R. § 704.
 - * The 33-day period from the day after March 12, 2008 (three months after the Office action mailed on December 12, 2007) to April 14, 2008, when Applicant’s response was received at the Office.
 - * The 2-day period from the day after May 9, 2008 (three months after the Office action mailed on February 9, 2008) to May 11, 2008, when Applicant’s response was received at the Office.

The sum of these periods under § 1.704, as reflected in the attached calculation from the Office’s PAIR web site, is 33 + 2 = 35 days. The reduction under § 1.703(f) thus leads to a final PTA calculation of 1169 – 35 = 1134 days.

Applicant believes that the disparity between the above calculation and the attached calculation from the Office’s PAIR web site arises from the Office’s current practice of considering “overlap” days. Applicant understands that the Office considers the entire period of 500 days under § 1.703(b) to “overlap” with the period of 941 days under 37 C.F.R. § 1.703(a). In *Wyeth*, however, the District Court of the District of Columbia held that that approach is in conflict with the statutory language in 35 U.S.C. § 154.

Under the correct calculation, as described by the *Wyeth* court, only the 272 calendar days that are actually in common between these two periods are considered to "overlap" under § 154. The disparity in the count of overlap days (500 days vs. 272 days, which is a difference of 228 days) leads to the 228-day error between the Office's calculation of 906 days of PTA and the correct calculation of 1134 days, as detailed above.

In view of this error, Applicant respectfully requests that the calculated patent term adjustment for the present application be corrected to indicate 1134 days of patent term adjustment. The undersigned hereby authorizes that the fee under 37 C.F.R. § 1.18(e), and any other fees required for this submission, be charged to deposit account no. 502306.

Respectfully submitted,



Shawn Doman
Attorney for Applicants
Reg. No. 60,362
Telephone: (512) 439-5092
Facsimile: (512) 439-5099



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09-12-2003	Application Is Now Complete	↑
06-24-2003	PGPubs nonPub Request	↑
08-28-2003	Cleared by OIPE CSR	↑
08-14-2003	IFW Scan & PACR Auto Security Review	↑
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